

Supreme Court No. _____
Court of Appeals No. 74916-1

**IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON**

JOHN CALVIN COLEMAN III,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

John Calvin Coleman III (“Mr. Coleman”), is the Petitioner in this Review Petition. He was convicted of hit and run - felony.

II. COURT OF APPEALS DECISION

Mr. Coleman seeks this Court’s review of the decision of the Court of Appeals of the State of Washington, unpublished opinion, State v. Coleman, No. 75916-1-I, (Wash. Ct. App. August 7, 2017). A true copy of the Court of Appeals, Division I of the State of Washington dated August 7, 2017 is appended hereto as Appendix “A.”

III. INTRODUCTION AND ISSUES PRESENTED FOR REVIEW

The case relates to an incident of hit and run that allegedly occurred on October 20, 2013, in King County, Washington. Mr. Coleman was convicted along with Defendant Malika Pa (“Defendant Pa”) for hit and run – felony. Defendant Pa was charged with vehicular homicide, vehicular assault, hit and run – felony with a death, and two counts of reckless endangerment. (Transcript, (“RP”) 10.22.15, 7:14-16). Mr. Coleman was alleged to have failed to follow the statutory requirements for a hit and run and was charged with violating RCW 46.52.020(1), (4)(a) or (b). On March 18, 2016, the trial court sentenced Mr. Coleman to the bottom range of 41 months. The offender score of Mr. Coleman was 2,

seriousness level of 9, with a standard range of 41 to 54 months in confinement. Mr. Coleman's counsel requested an exceptional sentence below the standard range. The trial court failed to even attempt to determine whether there were any mitigating circumstances to impose an exceptional sentence with respect to Mr. Coleman. The trial court's reasoning for not imposing a sentence below the standard range was that if the court did so, the State would just file an appeal and they would be back in the same place. The Court did not go through any analysis of the mitigating factors. Thus, the sentence in the standard range is an abuse of sentencing discretion. Moreover, the joint trial in this case substantially prejudiced Mr. Coleman since he was only charged with the hit and run felony while Defendant Pa was charged with more serious counts, including vehicular homicide. The evidence adduced on behalf of Defendant Pa contributed to the jury's decision against Mr. Coleman.

The issues presented are the following:

1. Did the trial court err in not severing Mr. Coleman's trial from the Defendant Pa's trial?
2. Did the trial court err in not imposing a sentence below the standard range to Mr. Coleman stating that it did not have the legal authority to do so?
3. Was Mr. Coleman denied effective assistance of counsel?

IV. STATEMENT OF THE CASE

A. Background

On October 20, 2013, Defendant Pa was hanging out with her friends in Seattle in the morning hours. (Case summary and request for bail, p. 1). Defendant Pa had apparently been drinking alcohol before going to the International House of Pancakes (IHOP), where she met up with several other folks. (Id.). The group remained at the IHOP for nearly an hour. (Id.). At approximately 3:30 a.m., the group was seen in several cars at a gas station where Defendant Pa was again seen drinking a “Four Loco,” an alcoholic drink. (Id.). Defendant Pa drove her mother’s car with three passengers and Mr. Coleman drove his car with one passenger. (Id.). The passengers in Defendant Pa’s car were worried about her driving and told her to slow down. (Id.). However, she was “dancing to the music while speeding” and driving like she was “invincible” and “swerving” on the road. (Id.). She was racing the other cars and using the oncoming lane to pass while driving on 23rd Ave S. (Id.).

Mr. Coleman was also on 23rd Ave S and he slowed to make a left turn onto S. King St. (Id.). He began his turn when Defendant Pa was speeding several car lengths behind him. (Id.). She crossed over the double yellow lines into the oncoming lane, accelerating to pass him. (Id.). She

crashed into Mr. Coleman's car with such incredible force that her car ended up sliding on its side, slamming the roof into a light pole. (Id.).

The passenger in front seat, Natsanet Teke, was ejected through the car's sun roof and died within the hour. (Id.). Another passenger, Kalani Duell fractured her femur and Briana Manson suffered soft tissue injuries. (Id.). Defendant Pa fled the scene. (Id.). Defendant Pa was later returned to the scene by her mother and sister an hour after the crash. (Id.). A blood test for substances did not show drugs or alcohol. (Id.). The prosecution alleges that Mr. Coleman and his passenger also fled the scene and there was no record that he contacted the Seattle Police or Fire Departments. (Id.). Mr. Coleman stated that he had a friend at the scene call 911, and that he reached out to the family of the deceased after the accident. (RP 03.18.16, 1126:20-22). The statement given by Mr. Coleman to the police was that he stayed at the scene until the time the ambulance came. (RP 11.04.15, 795:7-12).

B. Procedural History.

Mr. Coleman was charged under Count 3 for a hit and run – felony under RCW 46.52.020(1), (4)(a) or (b) on the basis of the Information filed by the State. (See Information). A complaint was filed as Cause No. 14-C-02763-6 SEA before the Superior Court of Washington for King County. A case investigation report containing the certificate of probable

cause was submitted by the Seattle Police Department on February 14, 2014. (See Case Investigation Report).

The charges against Defendant Pa included Count 1 – Vehicular Homicide, Count 2 – Vehicular Assault, Count 3 – Hit and Run –Felony, Count 4 & 5 – Reckless Endangerment. (See Information). Both defendants entered a plea of not guilty. (RP10.27.2015, 198:18-19). A joint jury trial was conducted in the case. Neither Mr. Coleman nor Defendant Pa testified in the case. (RP10.22.16, 112:5-9).

On November 9, 2015, by a joint verdict, a unanimous jury found defendants guilty of the offense alleged. (RP11.09.15, 1092:4-5). Mr. Coleman was found guilty of the crime of hit and run felony as charged in Count 3 of the Information. On March 18, 2016, the trial court found Mr. Coleman guilty of the offense charged. Considering the nature of the charge alleged against him and his effort to compensate the victim's family, Mr. Coleman filed a sentencing memorandum requesting exceptional sentencing below the standard range. However, the trial court sentenced Mr. Coleman with a standard range of 41-54 months.

On appeal, appellate counsel argued that the trial court erred in not severing the two charges in the Indictment. A joint trial in this case was highly prejudicial to Mr. Coleman's case because the charge against him was just a single count hit and run – felony and he was the one who was

actually hit by the vehicle. However, Defendant Pa was charged with more serious offenses under the counts of Vehicular Homicide, Vehicular Assault and Reckless Endangerment. By conducting the joint trial of Mr. Coleman with Defendant Pa, Mr. Coleman was highly prejudiced in properly defending his case. The evidence which ought to have been produced for his defense was not properly brought before the court due to the joint trial and ineffective assistance of counsel. All evidence provided focused mainly on Defendant Pa.

Further, Mr. Coleman's counsel sought from the court an exceptional sentencing below the standard range in his sentencing memorandum. (RP 03.18.16, 1127:6-8). However, the trial court noted that it actually wished to give Mr. Coleman a sentence below the standard range, but held that it could not legally do so. (RP 03.18.16, 1133:12-14). The court erred in holding that since Mr. Coleman did not cause the accident, the court will not be able to give an exceptional sentence down. (RP 03.18.16, 1133:5-9). By doing so, the trial court imposed Mr. Coleman a sentencing range same as Defendant Pa, who was actually responsible for the accident and the death of the deceased. (RP 03.18.16, 1133:9-12). The trial judge concluded the sentencing of Mr. Coleman with the bottom range of 41 months, as the court believed it did not have the authority to go below that range without any substantial or compelling

reason, but the court conducted no analysis as to the mitigating circumstances presented by Defense. (RP 03.18.16, 1133: 13-15). The offender score of Mr. Coleman was 2, seriousness level of 9, with a standard range of 41 to 54 months in confinement. Here, the trial court's ground for refusing to impose a sentence below the standard range to Mr. Coleman is clearly an abuse of discretion.

The Court of Appeals rejected Mr. Coleman's arguments, holding that he failed to move for severance of his trial from Pa, and, therefore, waived the issue. The Court of Appeals found that the trial court considered the relevant facts and legal arguments when exercising its discretion to deny Mr. Coleman's request for an exceptional sentence. Therefore, the Court determined that the sentence imposed on Mr. Coleman was not subject to review. Finally, the Court of Appeals rejected Mr. Coleman's assertions that he was denied effective assistance of counsel as a result of his counsel failing to produce witnesses to testify substantively as to his innocence, as well as to call a witness whose testimony would enable the 911 tape to be introduced into evidence in support of Mr. Coleman's argument that he had a friend call 911 before he left the scene of the accident.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. RAP 13.4 (b) Favors Review.

A review of this case is appropriate as it presents a significant question of law under the Constitution of the State of Washington and the United States. See RAP 13.4(b)(3).

B. The Court Of Appeals Erred When It Found Defendant Waived The Issue Of Severance.

The trial court erred by not severing Mr. Coleman's trial from the Defendant Pa's trial in this case. The trial court has discretion to conduct separate trials to avoid manifest injustice. "[S]eparate trials of jointly charged defendants is entrusted to the discretion of the trial court[.]" State v. Hoffman, 116 Wash. 2d 51, 74, 804 P.2d 577, 589 (1991) (citing State v. Grisby, 97 Wash.2d 493, 507, 647 P.2d 6 (1982), cert. denied sub nom. Frazier v. Washington, 459 U.S. 1211 (1983)). Separate trials are favored if the defendants seeking severance can demonstrate that "a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy." Id. at 590-91 (citing State v. Philips, 108 Wash.2d 627, 640, 741 P.2d 24 (1987)). Thus, courts allow severance of trials if "the conflict is so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." Hoffman, 116 Wash. 2d at 74 (citing Grisby, 97 Wash. 2d at 508).

Mr. Coleman further asserted that the courts “have the discretion to review an issue raised for the first time on appeal when it involves a ‘manifest error affecting a constitutional right.’” State v. Sublett, 176 Wash. 2d 58, 127, 292 P.3d 715, 749 (2012) (quoting State v. Easterling, 157 9 Wash.2d 167, 173 n. 2, 137 P.3d 825 (2006)). “[U]nder [the Rule of Appellate Procedure] 2.5(a), the court will address manifest error affecting a constitutional right for the first time on appeal.” Id. By its terms, RAP 2.5(a) applies to all errors not objected to at trial:

“The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: ... (3) manifest error affecting a constitutional right.” We have regularly required RAP 2.5(a)(3) analysis any time a party raises a constitutional error to which they did not object at trial. Sublett, 176 Wash. 2d at 151–52.

Mr. Coleman argued to the Court of Appeals that he was charged on a single count of hit and run – felony and that his involvement in the accident, as opposed to Defendant Pa, was clearly distinguishable from the facts of the case. Mr. Coleman highlighted numerous facts that show how the severity of his involvement in the accident differ from that of his codefendant in both role and legality. Mr. Coleman pointed out that he had been driving his vehicle slowly and was not involved in any reckless driving, he was simply making a left turn. There was no concerted action among Mr. Coleman and Defendant Pa in taking part in the alleged crime.

Mr. Coleman stated that he made his friend call 911 after the accident. (RP 03.18.16, 1126:20-22). Mr. Coleman was extremely panicked in the situation and stayed at the scene longer than the Defendant Pa. (RP 03.18.16, 1127:16, 1128:13-14). He also called the police back and left his number to give a complete statement. (RP 10.22.15, 41:1-5; RP 03.18.16, 1127:22). Detective Thomas Bacon (“Officer Bacon”), the police officer for the City of Seattle, testified that he received three voice messages from Mr. Coleman stating that he will come and talk to him about the incident. (RP 10.22.15, 37:13-15; 41:1-16; 46:6-13). Mr. Coleman admitted his involvement in the incident and he gave his full name and information to Officer Bacon. (RP 10.22.16, 41:22-25). Officer Bacon explained a text message the victim’s sister received from Mr. Coleman that expressed his condolences. Mr. Coleman said that he had his friend call an ambulance before leaving the scene. (RP 11.04.15, 800:20-25, 801:1-25, 802:1-6). Mr. Coleman’s statement was that he remained on the scene until the ambulance came. (RP11.04.15, 795:7-12).

Mr. Coleman argued that his involvement was unlike Defendant Pa, who was charged with vehicular homicide, vehicular assault, hit and run – felony with a death, and two counts of reckless endangerment. Mr. Coleman was not charged with the cause of the accident. He was only charged with hit and run – felony with a death. The particular charge

against Mr. Coleman was just that he was at the scene, and he left the scene without providing the necessary information. However, the jury was exposed to the evidence as a whole for a homicide where the driver left the scene, leaving a dying friend on the sidewalk and another friend with a fractured leg. Mr. Coleman asserted that the State projected Mr. Coleman's act with all the evidence related to the vehicular homicide and assault. There is clear evidence that Defendant Pa had been recklessly driving her vehicle and even the passengers in her car were apparently asking her to slow down. The court sentenced Mr. Coleman with almost the same sentence as Defendant Pa. In fact, Defendant Pa's conduct endangered Mr. Coleman, as her vehicle hit his as he was making a left turn. The jury was also taken out to see the Defendant Pa's vehicle to give them an idea of the amount of damage that was inflicted on the vehicle before it rested against the pole. (RP 10.22.15, 82:1-3). This caused the jury to make decisions based on their emotions rather than the rule of law. The jury was actually made to see the homicide being committed and all such evidence turned out very seriously against Mr. Coleman who had only been charged with a hit and run. (RP11.02.15, 600:21 25). Therefore, Mr. Coleman argued that even though the accident was caused solely due to Defendant Pa's reckless driving and arrogant conduct, the entire evidence related to Defendant Pa affected Mr. Coleman's single count of

hit and run – felony. Mr. Coleman clearly made his friend call 911 and had contacted the police voluntarily to provide his statement. This evidence got lost in all the testimony and evidence in regard to Defendant Pa. Mr. Coleman argued that there was no way the jury could not hear all the evidence against Defendant Pa and not unjustly infer the evidence against Mr. Coleman. Therefore, he asserted, the joint trial was highly prejudicial to Mr. Coleman.

The Court of Appeals held that Mr. Coleman waived the issue of severance of trial from that of his codefendant because his counsel never made such a motion. As to the issue of the failure to sever Mr. Coleman’s trial resulting in “manifest error affecting a constitutional right,” the Appellate Court found that Mr. Coleman had failed to assert meaningful argument to support this assertion. This was an erroneous finding as Mr. Coleman does put forth a lengthy supportive argument.

C. The Court Of Appeals Erred In Affirming The Trial Court’s Failure To Consider Imposition Of A Sentence Outside The Standard Range.

Mr. Coleman argued on appeal that the trial court failed to exercise its discretion when the court did not consider whether Mr. Coleman was entitled to an exceptional sentence below the standard range. Mr. Coleman’s trial counsel sought from the court an exceptional sentence below the standard range. (RP 03.18.16, 1127:6-8).

“ [A] court must generally impose a sentence within the standard sentence range. It may, however, impose a sentence above or below the standard range for reasons that are ‘substantial and compelling.’” State v. Fowler, 145 Wash. 2d 400, 404, 38 P.3d 335, 338 (2002) (quoting RCW 9.94A.120(1) & (2)). The Sentencing Reform Act of 1981(SRA) “contains a list of aggravating and mitigating factors ‘which the court may consider in the exercise of its discretion to impose an exceptional sentence.’” Id. (quoting RCW 9.94A.390). “[T]he list of mitigating factors is not exclusive, any reasons that are relied on for deviating from the standard range must ‘distinguish the defendant’s crime from others in the same category.’” Fowler, 145 Wash. 2d at 405 (quoting State v. Gaines, 122 Wash.2d 502, 509, 859 P.2d 36 (1993)).

Appellate review of a sentence would determine: (1) if “the record supports the reasons given by the sentencing court for imposing an exceptional sentence,” (2) “whether the reasons given justify the imposition of an exceptional sentence,” (3) whether the sentencing court’s reasons are “substantial and compelling,” and (4) “whether the sentence is clearly excessive or clearly lenient under the ‘abuse of discretion’ standard.” Id. at 405-06 (citing RCW 9.94A.120(2); RCW 9.94A.210(4)).

Mitigating factors will be substantial and compelling if: “(1) the trial court did not base an exceptional sentence on mitigating factors

necessarily considered by the legislature in establishing the standard sentence range, and (2) the mitigating factors are sufficiently substantial and compelling to distinguish the instant crime from others in the same category.” State v. Garcia, 162 Wash. App. 678, 683, 256 P.3d 379, 381 (2011), publication ordered (July 28, 2011) (citing State v. Law, 154 Wash.2d 85, 95, 110 P.3d 717 (2005)).

Even though the trial court noted that it actually wished to give Mr. Coleman a sentence below the standard range, it stated that it could not legally do so. (RP 03.18.16, 1133:12-14). This is clearly erroneous because the trial court has discretion to allow a sentencing below the standard range if there are substantial and compelling reasons, which there were in this case. Mr. Coleman’s sentence is clearly excessive because he has been sentenced to a term of the bottom range 41 months, but was still sentenced to the same amount of time as Defendant Pa, who was the cause of the accident and vehicular homicide. Further, the sentencing court may not take into account Mr. Coleman’s criminal history and the seriousness level of the offense while considering an exceptional sentence.

Mr. Coleman’s case involves mitigating factors that enable a deviation from the standard range because it distinguishes Mr. Coleman’s crime from Defendant Pa’s in the same category. Mr. Coleman was simply making a left turn when his car was hit by Defendant Pa’s. He made a

friend call 911 and waited until the ambulance arrived before leaving. He later contacted the police regarding the incident. These are not actions that should be punished the same as someone who actually caused the death of a young woman. Even more compelling, the victim's family spoke very favorably on Mr. Coleman's behalf at the sentencing hearing and noted that Mr. Coleman did attempt to provide for the victim's daughter. Nevertheless, the court refused to consider the mitigating factors. The Court of Appeals erroneously held that the trial court considered and rejected mitigating factors put forth by Mr. Coleman because the trial court heard argument regarding those factors. (Court of Appeals Opinion p. 8). However, the trial court made multiple statements which indicated it would not, or believed it could not, impose an exceptional sentence in this case. Therefore, the Court of Appeals erred in holding that the trial court considered and rejected mitigating factors when sentencing Mr. Coleman.

D. Counsel Was Ineffective When He Failed To Move For Severance, Failed To Call Witnesses To Prove Mr. Coleman's Conduct At The Accident Scene, And Failed To Introduce The 911 Call At Trial.

On appeal, Mr. Coleman asserted several examples where his trial counsel was ineffective. "A successful ineffective assistance of counsel claim requires the defendant to show that counsel's performance was deficient and that the defendant was prejudiced by the deficient

performance.” In re Crace, 174 Wash. 2d 835, 840, 280 P.3d 1102, 1105 (2012) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

“[P]rejudice [is defined] as the ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” Id. (quoting Strickland, 466 U.S. at 694). “‘A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” Id. (quoting Strickland, 466 U.S. at 694).

Mr. Coleman asserted to the Court of Appeals that he was deprived of the fair trial guaranteed by the Due Process Clause for several reasons, including ineffective assistance of counsel. Mr. Coleman also argued to the Court of Appeal that the ineffective assistance of counsel had a negative impact on the outcome of the proceedings against him. The Court of Appeals improperly characterized Mr. Coleman’s argument as being based on the “faulty assumption that the jury in a separate trial would not have learned that the accident involved a death or serious injury.” (Court of Appeals Opinion p. 5). This assumption is not relevant to Mr. Coleman’s arguments on appeal. Mr. Coleman’s argument to the appellate court is not that the jury wouldn’t know the accident involved a death, but that the extreme conduct of Defendant Pa which caused the accident as well as the death was, understandably, a feature of the joint trial. While Mr. Coleman’s trial necessarily would involve evidence regarding the

death which occurred, had he been tried alone, his trial would not have included the majority of the emotionally charged testimony about the acts which caused the accident as those acts were that of his co-Defendant, Pa. The severe facts of this case, as Mr. Coleman argued on appeal, resulted in the much more mundane facts surrounding Mr. Coleman's conduct being overshadowed by the egregious acts of Defendant Pa. Furthermore, Mr. Coleman argued that the failure to move for severance clearly constituted an objectively deficient performance, particularly in light of the vast difference in the conduct, charges and disparity of evidence alleged against each of the defendants in this case. The overwhelming evidence in the case against Defendant Pa related to the cause of death of the victim and the statement of the victim's family members all played a great part in overlooking Mr. Coleman's actual status as a victim in this case and it substantially prejudiced him. Mr. Coleman also showed he was prejudiced by the failure to sever his trial from Defendant Pa's, although the Court of Appeals erroneously stated he had not.

Mr. Coleman's counsel also failed to cross-examine numerous witnesses during the trial that could have given insight as to Mr. Coleman's actions after the accident, such as him staying until the ambulance arrived. (RP10.28.15, 313:12-14; 332:4, 356:19-20, 368:15-19; Tr. 11.02.15, 573:24, 592:13, 560:17-18; Tr. 11.03.15, 671:7). The state

marked as an exhibit Mr. Coleman's conversation with Officer Bacon on October 22, 2013, subject to redactions. Mr. Coleman's counsel did not object to it assuming to agree on further argument. (RP 11.03.15, 753:9-25, 754:1-13). The statement included the sentence "No, I didn't make an attempt to call the police department." (RP 11.03.15, 773:1-21). Mr. Coleman's counsel objected to admitting the statement, under the rule of completeness, without the next line "I did make" – However, counsel later agreed to offer it on cross, but failed to do so. (Id.). Even though Mr. Coleman stated that he made his friend call 911 and stayed in the scene until the ambulance arrived, Mr. Coleman's counsel did not call witnesses who could attest that he stayed on the scene as state and they were readily available.

Counsel also failed to produce a witness that would lay a foundation to admit the audio tape where Mr. Coleman could be heard shouting out to call 911 from the scene. The court heard the tape outside the presence of the jury, but would not allow counsel to play it while questioning Detective Bacon, since he could not lay a proper foundation for admitting it. (RP11.04.15, 862:10, 874:25). But the court told counsel that it could be played if Mr. Coleman or another witness at the scene testified. (Id.) Mr. Coleman's counsel failed to ever bring the audio tape up again. Further, during the trial, Mr. Coleman's counsel argued that the

statute does not actually obligate Mr. Coleman to contact the police as an exclusive option. (RP11.03.15, 773:22-25; 774:1-24). He argued that the first thing that the statute requires is that Mr. Coleman exchange information with the driver or passengers and he complied with it by reaching out to the family. (Id.). The court was not sure as to who was contacted by Mr. Coleman, whether the driver's family or the deceased girl's family, and noted that it would think about it later. (Id.). According to the court, the aspect of reaching out to the family of driver or deceased as to satisfy Mr. Coleman's obligation under the statute as a strict liability is to be ascertained. (RP 11.03.15, 775: 1-25). However, Mr. Coleman's counsel did not address this issue later and he did not raise this crucial issue again while questioning any witnesses.

Additionally, Mr. Coleman's counsel did not argue on the issue related to application of Miranda rights to Mr. Coleman. The court found the statements made to Detective Bacon over the phone were not a custodial interrogation, so the statements were admissible. (RP 10.22.15, 116:23-25, 117:1-5). Mr. Coleman's counsel never questioned or objected to this issue. Thus, the conduct of Mr. Coleman's counsel was deficient. There is more than a reasonable probability that, but for counsel's unprofessional errors, Mr. Coleman could have had a different result of his case.

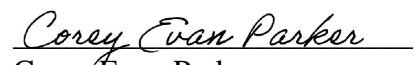
The Court of Appeals held Mr. Coleman failed to demonstrate ineffective assistance of trial counsel. First it indicated Mr. Coleman did not put forth legal argument to substantiate his allegations that counsel's performance was deficient. The Court also indicated that Mr. Coleman neglected to articulate what witnesses were available to support his claims of availability to testify at trial. Finally, the Court stated it was unable to consider the matters Mr. Coleman complained of as they were outside the record on appeal. (Court of Appeals Opinion p. 9). Mr. Coleman articulated numerous deficiencies of trial counsel which were not decisions and conduct related to trial strategy, and which do constitute ineffective assistance of counsel. The Court of Appeals erred in concluding otherwise.

VI. CONCLUSION

Petitioner respectfully requests that this Court accept this review for the reasons stated in the petition and grant the petition on its merits.

DATED this 6th day of September, 2017.

Respectfully Submitted,


Corey Evan Parker
Law Office of Corey Evan Parker
1275 12th Avenue NW, Suite 1B
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Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Corey Evan Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on September 6, 2017, I caused to be served the document to which this is attached to the party listed below in the manner shown next to their name:

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King County Prosecuting Attorney
Appellate Unit
paoappellateunitmail@kingcounty.gov

- By Email
- By Fax
- By Fed Express
- By Hand Delivery
- By Messenger

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Appendix "A"

RICHARD D. JOHNSON,
Court Administrator/Clerk

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August 7, 2017

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CASE #: 74916-1-I
State of Washington, Respondent v. John Calvin Coleman, III, Appellant
King County, Cause No. 14-1-02763-6 SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Affirmed."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

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74916-1-I, State v. John Calvin Coleman, III
August 7, 2017

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

A handwritten signature in black ink, appearing to read 'R.D. Johnson', with a long horizontal line extending to the right.

Richard D. Johnson
Court Administrator/Clerk

khn

Enclosure

c: The Honorable Mariane C. Spearman
John Calvin Coleman, III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 JOHN CALVIN COLEMAN III,)
)
 Appellant.)
 _____)

DIVISION ONE
No. 74916-1-I
UNPUBLISHED OPINION
FILED: August 7, 2017

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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DWYER, J. – A jury found John Coleman III guilty of felony hit and run. On appeal, he contends that the trial court erred in failing to sever his trial from his codefendant’s trial. But because Coleman did not move for severance, he has waived the issue. Coleman’s claims of ineffective assistance and sentencing error are also without merit. We affirm.

I

On the evening of October 18, 2013, 21-year-old Natsanet Asegay asked her parents to babysit her baby daughter while she went out with her friend Malika Pa. Around midnight, Pa drove by in a black Acura SUV and picked up Asegay. Pa then picked up two other friends, Briana Manson and Kelani Duell, and drove to an International House of Pancakes (IHOP) on Capitol Hill.

After hanging out at the IHOP for a couple of hours, Pa and her friends left and drove to a nearby gas station. Several individuals, including Coleman, also left the IHOP and followed in other cars.

Duell testified Pa had been drinking and was "a little turned up." Duell argued with Pa about her driving and told her to slow down.

After leaving the gas station, the caravan of five or six cars proceeded southbound on 23rd Avenue South, with a posted speed limit of 30 miles per hour. Coleman was driving the lead vehicle, a silver Saturn.

The music in Pa's car was loud as she drove away from the gas station. All of the young women were "dancing and goofing around in the car." Pa "just wanted to do her own thing" and did not pay attention to the passengers' complaints about her erratic driving. Manson estimated that Pa was traveling about 50 miles per hour. Duell testified that Pa was "speeding" and "swerving" and estimated she was going about 60 miles per hour.

As the cars approached King Street, Pa pulled out into the oncoming lane of traffic and accelerated to pass the cars in front of her. At about the same time, Coleman slowed and began a left turn onto King Street. Pa's car struck Coleman's car at high speed and flipped several times before crashing into a light pole. Coleman's Saturn came to rest about 100 feet from the intersection.

Asegay was ejected through the Acura's sunroof. She died at the scene from massive head trauma. Manson crawled out of the wreckage through the sunroof and then pulled Duell out. Duell suffered a fractured femur.

When Seattle Police officers arrived a few minutes after the accident, both Pa and Coleman had left the area. Pa returned a few hours later with her mother and spoke to the police. Coleman did not return.

While attempting to determine who had been driving the Saturn, Detective Thomas Bacon spoke with Coleman by phone on October 22, 2013. Coleman admitted that he was driving the Saturn at the time of the crash. He explained that he was at the IHOP and had driven off with the other cars. Coleman was on his way to a friend's house to "chill the rest of the night" when the Saturn was "sideswiped" as he attempted to turn left. Coleman estimated he was at the scene for "three [or] four minutes max," but also claimed he stayed until an ambulance arrived. Coleman also said that he made no attempt to call the police.

A few days after the accident, Coleman sent a text message to Asegay's sister, expressing his condolences and admitting he drove the other car in the accident. Coleman acknowledged he had fled the scene, but claimed he "made sure my bro Ray called the ambulance."

The State charged Coleman with one count of felony hit and run. Pa was charged with vehicular homicide, vehicular assault, felony hit and run, and two counts of reckless endangerment. Following a joint trial, the jury found both defendants guilty as charged. The court sentenced Coleman to a low-end standard term of 41 months.

II

Coleman contends the trial court erred in failing to sever his trial from his codefendant's trial. He argues that the severity of the multiple charges involving Pa and the related evidence necessarily prejudiced the jury's consideration of his case.

The trial court has broad discretion to grant a severance if "deemed appropriate to promote a fair determination of the guilt or innocence of a defendant."

CrR 4.4(c)(2)(i); In re Pers. Restraint of Davis, 152 Wn.2d 647, 711, 101 P.3d 1 (2004). But the failure to move for severance results in a waiver of the issue. CrR 4.4.(a)(1) (severance is waived if defendant does not move for severance before trial or before or at the close of evidence); see also State v. Emery, 174 Wn.2d 741, 754, 278 P.3d 653 (2012).

Coleman never requested to be tried separately. He has therefore waived the severance issue.

Coleman claims the joint trial resulted in a “manifest error affecting a constitutional right” that this court may review under RAP 2.5(a). But he has not provided any meaningful argument to support this conclusory assertion. We therefore decline to consider it. See Saunders v. Lloyd’s of London, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (appellate court will decline to consider issues unsupported by cogent legal argument and citation to relevant authority).

III

Coleman contends that he was denied effective assistance when defense counsel failed to move for a separate trial, thereby waiving the severance issue. We disagree.

To establish ineffective assistance, Coleman must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the outcome of the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). “If either element of the test is not satisfied, the inquiry ends.” State v. Kyllö, 166 Wn.2d 856, 862, 215 P.3d 177

(2009). A claim of ineffective assistance is a mixed question of law and fact that we review de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

“To establish prejudice based on an improper joint trial, a defendant must show that a competent attorney would have moved for severance, that the motion likely would have been granted, and that there is a reasonable probability he would have been acquitted at a separate trial.” Emery, 174 Wn.2d at 755. Coleman cannot satisfy this standard.

Separate trials for codefendants are disfavored in Washington “because of concerns for judicial economy, [f]oremost among these concerns is the conservation of judicial resources and public funds.” Davis, 152 Wn.2d at 711 (alteration in original) (quoting State v. Bythrow, 114 Wn.2d 713, 723, 790 P.2d 154 (1990)). “A defendant seeking to sever trial from a codefendant has ‘the burden of demonstrating that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy.’” Davis, 152 Wn.2d at 711-12 (quoting State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991)).

Coleman contends that the number and severity of Pa’s offenses and the attendant emotional consequences precluded the jury from fairly assessing the law and facts involving his single, less serious offense of felony hit and run. In particular, Coleman points to the fact that “[t]he jury was actually made to see the homicide being committed and all such evidence turned out very seriously against Mr. Coleman.”

Coleman’s arguments appear to rest primarily on the faulty assumption that the jury in a separate trial would not have learned that the accident involved a death

or serious injury. But the State charged Coleman with felony hit and run under RCW 46.52.020(4)(a) and (b), which required the jury to determine whether the accident involved a death or injury. Consequently, even in a separate trial, the jury would have learned of Asegay's death and Duell's serious injury.

Moreover, the trial court instructed the jury that

A separate crime is charged in each count. You must separately decide each count charged against each defendant. Your verdict on one count as to one defendant should not control your verdict on any other count or as to any other defendant.

Jury Instruction 9. We must presume that the jury followed these instructions and applied the correct legal standards in reaching its decision. See Strickland, 466 U.S. at 695 (when assessing whether counsel's deficient performance prejudiced the defendant, a reviewing court must presume "that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision").

Coleman's claim that the jury's verdict was based on emotion rather than on the facts and the law is too speculative to establish that the result of a separate trial would have been different. Because Coleman fails to establish any resulting prejudice, we need not determine whether counsel's failure to seek severance was deficient performance.

IV

Coleman contends that the trial court erred in not imposing an exceptional sentence below the standard range. He argues that the court's failure to consider his request for an exceptional sentence constituted a reversible abuse of discretion.

Under the Sentencing Reform Act, the sentencing court must generally impose a sentence within the standard sentencing range. RCW 9.94A.505(2)(a)(i); State v. Graham, 181 Wn.2d 878, 882, 337 P.3d 319 (2014). The court may impose a sentence outside the standard range if it finds “there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. RCW 9.94A.535(1) sets forth a nonexclusive list of mitigating circumstances that authorize an exceptional sentence below the standard range if the court “finds that mitigating circumstances are established by a preponderance of the evidence.”

With few exceptions, the defendant may not appeal a sentence within the standard range. RCW 9.94A.585(1). Review of the court’s refusal to impose an exceptional sentence downward is also limited:

review [of an exceptional sentence below the standard range] is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances Even in those instances, however, it is the refusal to exercise discretion or the impermissible basis for the refusal that is appealable, not the substance of the decision about the length of the sentence. Conversely, a trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling.

State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

Coleman requested an exceptional sentence based on RCW 9.94A.535(1)(e) (“The defendant’s capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired.”) and RCW 9.94A.535(1)(f) (“The offense was principally accomplished by

another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.”).

At sentencing, the court considered a lengthy argument from the parties about Coleman’s request for an exceptional sentence. The court correctly noted that causation was not an element of felony hit and run and that the fact Coleman did not cause the accident was not a circumstance that can support an exceptional sentence. Coleman never identified any evidence suggesting that the accident significantly impaired his capacity to appreciate the wrongfulness of his conduct.

After reviewing some of the salient circumstances of Coleman’s offense, the court concluded:

I can’t find any substantial and compelling reasons to do that. The ones that we’re talking about here are not legally justifiable.

The record provides no support for Coleman’s claim that the trial court “refused to even consider the mitigating factors.” Viewed in context, the court clearly considered the relevant facts and legal arguments and exercised its discretion in denying the request for an exceptional sentence. Accordingly, Coleman cannot appeal his standard range sentence.

V

Coleman raises several additional cursory allegations that defense counsel was constitutionally deficient. He contends that counsel failed to cross-examine “numerous witnesses” who could have given “insight” into his actions after the accident, failed to object to the admission of Coleman’s statements to Detective Bacon, failed to call “readily available” witnesses who could have testified to his

actions after the accident, failed "to produce a witness" who could have laid a foundation for the admission of the 911 recording, and failed to fully raise the issue of partial compliance with the hit and run statute.

Coleman presents no legal argument establishing that any of counsel's alleged omissions constituted deficient performance. Nor has he identified any of the witnesses that counsel should have called or their potential testimony. Moreover, the allegations regarding additional witnesses and further cross-examination of the State's witnesses all involve matters outside the record that this court cannot consider in a direct appeal. See McFarland, 127 Wn.2d at 337-38.

Coleman fails to demonstrate ineffective assistance.

Affirmed.

We concur:

Trickey, A.C.J.

Dwyer, J.

Appelwick, J.

LAW OFFICE OF COREY EVAN PARKER

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Filing Petition for Review

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